IN THE

Supreme Court of The United States

NO. 31
OCTOBER TERM, 1961

GWENDOLYN HOYT,
Appellant,

-vs-

STATE OF FLORIDA,
Appellee.

BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE

Appellee accepts appellant's statement of the case only insofar as it reflects a true and correct resume of what the record below would reveal.

POINTS INVOLVED ON APPEAL

In essence but two points are posed for determination by this Court, to-wit:

WHETHER APPELLANT'S CONVICTION SHOULD BE SUSTAINED IN THE FACE OF SECTION 40.01, FLORIDA STATUTES, WHICH SECTION ACCEPTS WOMEN FOR JURY SERVICE ONLY IF THEY REGISTER THEIR WISH TO SO SERVE WITH THE CLERK OF THE CIRCUIT COURT?

This of course becomes a question of the constitutionality of Section 40.01, supra.

The remaining point is:

DOES THE RECORD UNEQUIVOCALLY REVEAL A SYSTEMATIC, PLANNED AND INTENDED EXCLUSION OF AVAILABLE WOMEN FOR JURY SERVICE DURING THE TERM OF COURT IN WHICH APPELLANT WAS TRIED?

ARGUMENT

POINT I

Appellant's protestations to the contrary notwithstanding, it does not appear that Section 40.01 (1), Florida Statutes:

"40.01 *Qualifications and disqualifications of jurors.*—

"(1) Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one years, who are citizens of this state, and who have

> **resided in the state for one year and in their respective counties for six months, and who are duly qualified electors of their respective counties; provided, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list.**

either directly or indirectly excludes any qualified woman elector from serving as a juror if that be her wish. Even adopting appellant's numerical pronouncement, there is no reason, with or without the confines of the section above quoted, to suspect, urge or argue that 46,000 women could not have become potential jurors in Hillsborough County, Florida, in 1957.

Though the record is somewhat vague as to the number who actually registered their wish to serve as jurors, (R. 12, 24) let us assume that the acceptable figure of 250 reflects the number of women who had been so registered at the time of appellant's trial. Does it, by any stretch of the imagination, follow that because only that number registered, the statute excluded women from service as jurors? Of course, the answer to this must be an unqualified "no".

It is of no particular consequence that certain writers may have concluded that very few women volunteer to serve on juries when that is a prerequisite.

It must be remembered that the constitutional condemnation (due process) is limited to the exclusion of a class without regard or reason.

Appellee concedes the decisions of this Court condemning unconstitutional discrimination against classes, see *Hernandez v. Texas*, 74 S. Ct. 667, 98 L. Ed. 866, 347 U.S. 475; *Brown v. The Board of Education of Topeka*, 347 U.S. 483, 492, and *Thiel v. Southern Pacific Company*, 166 A. L. R. 1412, 90 L. Ed. 1181, 66 S. Ct. 984, 328 U.S. 217; and will cheerfully concede the salutary effect they have had on subsequent proceedings involving substantially the same circumstances. However, appellee is quick to note that no such blanket exclusion can be found within the confines of this case or the legislation under attack.

Only recently this Court in the case of *Fay v. New York*, 332 U.S. 261, 91 L. Ed. 2043, put an almost identical question finally and fully to rest in the majority opinion rendered in that case. It would serve no useful purpose for this Court to again recite circumstances not unlike those which it found acceptable in the *Fay* case, supra, here simply to reannounce an already well-established principle.

This Court's attention is called particularly to the phase of the argument presented by appellant wherein she concedes that it has been held that any state legislature may exclude an entire class of citizens such as females from jury service (see *Strauder v. W. Va.*, 100 U.S. 303, 25 L. Ed. 664; *United States v. Roemig*, 52 Fed. Supp. 852; and *Hall v. State*, 136 Fla. 644, 187 So. 392; See Annotation; 157 A. L. R. 464.)

However, in an attempt to detract from the support these cases lend that general proposition, she alludes to

several recent decisions of this Court, wherein, because of rulings on the specific point of excluding Negroes and/or Mexicans *solely because of race*, she concludes there may be some doubt of the continuing validity of those former rulings.

Such a complaint certainly cannot be aimed at the Fourteenth Amendment to the Federal Constitution inasmuch as the amendment itself does not either directly or in effect prohibit the states from denying women the right to serve on juries—nor does it render void a statute providing for the selection of males alone as jurors. See *Strauder v. W. Va.*, supra. Her alleged condemnation must find its fertile ground if anywhere, within either the "equal protection" or "due process" clauses thereof. That simply cannot be done because of the *Fay* case, supra.

Appellant's right in this case, or for that matter, in any case, is merely one to a neutral jury. See *Fay v. New York*, supra. It is noted she never assailed the jury which did convict her because of bias, non-neutrality, or prejudice. Certainly she had no constitutional right to female friends on the jury.

Appellant makes several grand references to landmark cases where the *systematic, planned and intended exclusion of certain classes of citizens from jury duty* (because of race, creed, color or economic status), has been repeatedy struck down by this Court. We have no quarrel whatever with those cases *in the sphere of their operation*. However, we are unable to discover how she seeks to expand the principle announced in those cases to cover her present situation.

For whatever this Court may consider it to be worth, the case most nearly factually identical to the one at bar is *State v. Dreher*, 166 La. 924, 118 So. 85, Cert. Denied 278 U.S. 641, 73 L. Ed. 556, 449 S. Ct. 36. To be sure, your appellee does not urge that a denial of certiorari by this Court constitutes a favorable ruling on the merits, however, it is deemed appropriate to present it for purposes of persuasive illustration.

Among the points urged for reversal in the *Dreher* case, supra, was a claim that the constitutional and statutory provisions that no woman should be drawn for jury service unless she had filed a written declaration of her desire to so do was invalid and, furthermore, that this woman, one of the women defendants in the case, had a right to be tried by a mixed jury of men and women. It is interesting to note that the provision relating to women jurors in the State of Louisiana reads almost exactly like the one in Florida provided for in Section 40.01 (1), supra. The two appropriate sections read as follows:

Florida Statute:

"provided, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list."

Louisiana Statute:

"That no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the district court a written declaration of her desire to be subject to such service."

It appears from the above that no particular depth is necessary in order to see that the two provisions are so nearly identical as to literally mirror each other.

Appellee does not consider it remiss to suggest, or perhaps even urge that despite the mystic shroud which engulfs a denial of certiorari, such a denial must mean something more than a mere declination to review. The appellee cannot bring itself to believe that such a cataclysmic series of events (the denial of the right to women to serve as jurors in Louisiana courts), calculated to deprive *a woman defendant* of her rights to "equal protection" under the Fourteenth Amendment to the United States Constitution, would produce in this Court no greater wish than to enter a simple order denying certiorari UNLESS this Court genuinely believed that even if everything was as urged, no rights had been violated thereby.

Having preceded such denial by its yet unchanged ruling in *Strauder v. W. Va.*, supra, and following such denial by its yet unchanged and infinitely more pointed ruling in *Fay v. New York*, supra, one can only wonder what, if indeed any, new basis has been presented in the instant case to merit the complete turnabout so devoutly wished by appellant.

The supreme court of Louisiana stated in the *Dreher* case, supra, at pages 92 and 93, that they had formerly ruled on the point in another cited case and said that they had considered the argument that such a provision was discriminating as to women jurors, and concluded that as a matter of fact, it was altogether favorable to

them because it gave them the option of saying whether they would be subject to that jury service or not. The court concluded, saying at page 93:

> "This section is reasonably permissive, as the exercise of the right to serve as jurors is not burdened with any arbitrary restriction imposed upon women because of sex or as a class, but has been incorporated into the organic law of the state solely for the purpose of avoiding compulsory service of women upon juries, contrary to their wishes to exercise such a privilege of citizenship."

Thus, it is also true here that if there is indeed such an exclusion as that sought to be urged by appellant in the instant case, it is an exclusion put into effect solely and exclusively by virtue of the very people effected. In short, the potential women jurors of Hillsborough County have the unqualified option of declaring themselves available or unavailable for jury service by registering their intent with the clerk of the circuit court as provided in the aforementioned section.

Thus it is, we see, that the touchstone is "availability" and not "eligibility" to which the legislation directs itself. All the qualified female electors in Hillsborough County, Florida, are eligible to serve as jurors. Whether they make themselves "available" is a matter left entirely to them and them alone.

The conclusion has been advanced that inasmuch as a court is, or should be, free to relieve women jurors of this civic duty because of pressing demands that only they can serve, there is no need to make their service as jurors a voluntary act.

Certain it is that the women in question are best qualified to determine if and when they are free to serve as jurors and it matters not that they indicate a negative wish by simply refusing to register rather than being forced to go to the courtroom and make an affirmative request of the judge that they be relieved of the responsibility. So it is again that the question becomes one of "availability" and not "eligibility".

Appellant then makes much of the strides which women have made since their enfranchisement. She cites an impressive array of statistics to indicate the role which women play in our modern-day world in an effort to buttress her conclusion that what may have existed as a condition in 1879 such as might have prompted this Court to conclude in its opinion in the case of *Strauder v. W. Va.*, supra, that women can be completely excluded from service as jurors by the several states, is no longer necessarily so and therefore such a pronouncement should not only be refused but overruled.

Until recently and perhaps for very nearly half a century after the adoption of the Fourteenth Amendment, it seemed to be universal practice in this country to allow only men to sit on juries. It seems that the first state to permit women jurors was Washington and even it did not do so until 1911. See: *1911 Laws of Washington*, c. 57. See: *Carson, Women Jurors* (1928). Even so recently as 1942, only 28 states permitted women to serve on juries—they were still disqualified in the other 20. Moreover, of these 28 states which permitted women

to serve as jurors, in 15 of them the women were privileged to claim an exemption because of their sex. See: *Report to the Judicial Conference of the Committee on Selection of Jurors* (1942), 23. Consequently, we align our rationale with that of this Court in the *Fay* case, supra, in that it would, in light of such a history, take something more than a judicial interpretation to spell out of the Constitution a command to set aside verdicts rendered by juries which were unleavened by feminine influence.

Appellant's contention essentially is that women should be freely admitted on juries and is one which cannot be said to be based on the Constitution, but, rather, one which is based on a changing view of the relative rights and responsibilities of women in our public and social life. While it may be true that this has actually progressed in virtually all phases of life as we know it today, including jury duty, it certainly has not achieved the stature of a constitutional compulsion on the states, excepting only as reflected in the grant of women's enfranchisement by the 19th Amendment to the United States Constitution.

Quite apart from the historical differences which have long formed the basis upon which a given legislature may hold that women are ineligible to serve as jurors (See *Strauder v. W. Va.*, supra); which historical difference has not been modified in any substantial particulars, it must be apparent that there does not exist, within the confines of this statute, any reference or mention to "exclusion" of women as jurors in the State of Florida. It is, quite the contrary, a permissive right given them, said

right implemented by the simple expedient of announcing their wish to serve as potential jurors to the clerk of the circuit court.

Appellee notes that nowhere within the confines of appellant's brief is any statistic cited which would, even in the slightest, tend to do away with the very practical and material reasons for the differences in responsibilities assigned to men and women in our society.

Ever since the dawn of time conception has been the same. Though many eons may have passed, the gestation period in the human female has likewise remained unchanged. Save and except for a number of beneficial precautions presently available, parturition is as it well may have been in the Garden of Eden. The rearing of children, even if it be conceded that the socio-psychologists have made inroads thereon, nevertheless remains a prime responsibility of the matriarch. The home, though it no longer be the log cabin in the wilderness, must nevertheless be maintained. The advent of "T.V." dinners does not remove the burden of providing palatable food for the members of the family, the husband is still, in the main, the breadwinner, child's hurts are almost without exception, bound and t r e a t e d by the mother.

No part of appellant's statistical attack, or for that matter, her textual assault, even so much as attempts to broach the above. Her negative choice in this respect (surely there was a choice) was well advised, for these are the classic differences and bases upon which the sound pronouncement of this Court in *Strauder v. W. Va.*,

supra, was founded—they are every bit as sound and compelling today. The only bulwark between chaos and an organized and well-run family unit is our woman of the day. She and she alone ministers to our wants and needs as the partner in marriage, the mother in travail, and the healer and comforter during illness and sadness.

Should our woman of the day find herself possessed of sufficient free time and inclination, she has but to voice her wish to be a juror with the clerk of the circuit court and no one would gain-say her right to so serve.

Nor is it correct to say that this Court rejected the cases discussed in the *Fay* case, supra, in its decision in *Hernandez v. Texas*, supra.

It is apparent that what appellant really contends is, that she had a right to be tried by a jury on which there were females. This is clearly obvious from her argument throughout the pleadings both in the Florida Supreme Court and here. Whatever may be the merit in such a claim, your appellee respectfully suggests, nay urges, that appellant's right is not one of selecting her jurors but, rather, in rejecting those on the panel. She had no more right to be tried by a mixed jury of women and men than would a male defendant. Essentially, it can be said that the Constitution of the United States merely guarantees that in all criminal prosecutions, the accused shall have the right to a speedy and public trial by an "impartial jury". Her true contention thus becomes a claim that the absence of women on the jury panel deprived her of the right to trial by an "impartial jury" contrary to the precepts of the Constitution.

An "impartial jury" is not denied by the absence or exclusion of women from jury duty. "Impartiality" has nothing to do with whether women are subject to jury duty or not. "Impartiality" is *a state of mind*. Its existence or absence does not depend upon whether the juror is male, female, black, white, or what have you.

That same contention was raised and quickly dispelled in the case of *Baker v. Hudspeth* (CCA 10th 1942), 129 Fed. 2d 779, See Text 781, 782, certiorari denied 617 U.S. 681, 87 L. Ed. 546; rehearing denied, 317 U.S. 711, 87 L. Ed. 566, 318 U.S. 800, 87 L. Ed. 754.

The test of "impartiality" there laid down should be of equal applicability here.

Thus, it must follow as the night the day that appellant, in the prosecution below, was heard by a jury (which she accepted), impaneled pursuant to a lawful provision of Florida law, enjoyed every right consistent with sound, legal principles and had none of her rights, privileges, or immunities abridged by any act of Florida or by the jury commission.

POINT II

The suggested arbitrary selection made by the jury commission occurs every day—in one degree or another —throughout our land. Each time a jury box is filled or list compiled, the names selected must be the product of an arbitrary selection: that simply must occur at one stage or another of the proceedings. However, conceding this; and surely one must, one complaining must show

the arbitrary selection was a deliberate, planned, systematic exclusion not possessed on any legality whatsoever.

This very Court, in its opinion in the *Fay* case, supra, had this to say anent the point:

> "It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination, and in nearly all cases it has been shown to have persisted over many years. Virginia v. Rives 100 U.S. 313, 322, 323, 25 L. ed. 667, 670, 671; Martin v. Texas, 200 U.S. 316, 320, 321, 50 L. ed. 497, 498, 499, 26 S. Ct. 338; Thomas v. Texas, 212 U.S. 278, 282, 53 L. ed. 512, 513, 29 S. Ct. 393; Smith v. Texas, 311 U.S. 128, 85 L. ed. 84, 61 S. Ct. 164; Hill v. Texas, 316 U.S. 400, 86 L. ed. 1559, 62 S. Ct. 1159; Akins v. Texas, 325 U.S. 398, 89 L. ed. 1692, 65 S. Ct. 1276, supra. Also, when discrimination of an unconstitutional kind is alleged, the burden of proving it purposeful and intentional is on the defendant. Tarrance v. Florida, 188 U.S. 519, 47 L. ed. 572, 23 S. Ct. 402; Martin v. Texas, 200 U.S. 316, 50 L. ed. 497, 26 S. Ct. 338; Norris v. Alabama, 294 U.S. 587, 79 L. ed. 1074, 55 S. Ct. 579; Snowden v. Hughes, 321 U.S. 1, 8, 9, 88 L. ed. 497, 502, 503, 64 S. Ct. 397; Akins v. Texas, 325 U.S. 398, 400, 89 L. ed. 1692, 1694, 65 S. Ct. 1276."

The appellant's stand under this question is one of at least questionable import, inasmuch as this Court never has rejected the principle it announced in the case of *Strauder v. W. Va.*, supra, wherein it said there was no restriction imposed by the Fourteenth Amend-

ment against a state denying women the right to serve on a jury. It is perforce idle to suggest for one moment that the instant case presents an area of such magnitude simply because in this instance a woman defendant was tried by a jury (not itself alleged to be either prejudiced, biased, or partial), which was unleavened by the presence of women.

In the first place, this Court said in the *Fay* case, supra, that no defendant has a right to friends on the jury nor do they have a right to either all male, all female, or any particular proportion thereof. Inasmuch as that specific ruling (sans dissent) has been made by this Court, it is of little if indeed any significance that this Court has not specifically said that a *woman* defendant convicted in a State court by a jury unleavened by women, did not receive equal protection.

Whatever else may be true, neither this Court nor, for that matter, any other court, has yet required the presence of women on juries as a necessary adjunct to full compliance with the well-ordered precepts of due process and equal protection as we know it today.

Even conceding that the jury commission in question did not add any new names of available women jurors when they replenished the depleted jury box, it cannot be said that this constituted the type of action so frequently condemned as an arbitrary, planned and intended discrimination against a class. The ten women's names that went into the jury box initially formed an appreciable representation of those who declared themselves

available; just as did the 9000 odd men's names form an appreciable representation of the approximately 70,000 available men jurors.

It further follows that even if the jury commission had placed all but one woman's name in the box, appellant's position would logically be the same yet who would argue that all the men's names had to be placed in the box?

The jury commission in question must make such selections as they deem intelligent in the circumstances.

Since no women had been called from the initial jury box and since the figure first introduced into the box was at least representative of the women jurors available, there was no need to add thereto. If this be condemned, then indeed why not condemn the failure of the jury commission to include the entire list of male jurors—on the theory that the failure to do so made the jury box non-representative.

Throughout the course of appellant's brief the single thread which forms the knot is as follows:

Because she was a woman and had committed an act, the circumstances of which could best be understood by women, she was deprived due process because she had no real chance of securing a woman on her jury. This position is one which she cannot support by any law or rationale with which appellee is acquainted. See *Fay v. New York*, supra.

Might it not be further argued logically that since women have been shown, by appellant's own statistics,

to be the equal of men in every sense of the word, that she was in fact tried by the ultimate in juries—male equivalence appearing to be the goal of the statistical position advanced by the appellant?

CONCLUSION

WHEREFORE, appellee respectfully urges this Court, upon the authorities set out above and arguments advanced thereunder, to affirm the conviction at issue.

Respectfully submitted,

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Counsel for the Appellee.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Brief of the Appellee to the Honorable Herbert B. Ehrmann, 50 Federal Street, Boston, Massachusetts, Counsel for the Appellant, by mail, this ..... day of September, 1961.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel for the Appellee.